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71-1469

FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

CAMELLIA GHASSEMI, an infant, and CYRUS GHASSEMI, an infant, by FIROOZ GHASSEMI and MEHRBANOU GHASSEMI, their Parents and Natural Guardians,

Petitioners,

against

UNITED STATES, JOHN MITCHELL, UNITED STATES ATTORNEY GENERAL, RAYMOND F. FARRELL, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, and SOL MARKS, ACTING DISTRICT DIRECTOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CONSTITUTIONAL AMENDMENTS

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Fourteenth 3

IN THE

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled case on the 10th day of April, 1972, which affirmed a decision of the Eastern District Court of New York (Rosling, J.) which granted respondents' motion for summary judgment and dismissed petitioners' complaint which seeks to declare Section 201(b) of the Immigration and Nationality Act (8 U.S.C. 1151(b)) unconstitutional and to direct the issuance of immigrant visas to the parents of the native born American minor children as "immediate relatives".

No Opinion Below

The judgment of conviction of the District Court was affirmed without opinion of the Circuit Court.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on the 10th day of April, 1972 (Appendix "A", *infra*, p. 11 *id.*). No petition for rehearing has been made to the Circuit Court of Appeals for the Second Circuit; nor have any extensions of time been granted within which to file this petition. Jurisdiction of this Court is invoked under Title 28, Section 1254(1) United States Code and Rule 22(2).

Questions Presented

1. Whether the decision to be rendered by the court in *Mandel* v. *Mitchell*, which was argued in April, 1972, will substantiate the position of the petitioners herein, who are native born United States citizens, that 8 U.S.C. 1151(b) is unconstitutional?

2. Whether 8 U.S.C. 1151(b) is unconstitutional?

3. Whether the decision below is contrary to the purpose and intent of 8 U.S.C. 1151(b)?

4. Whether the decisions in *Faustino* v. *Immigration and Naturalization Service*, 302 F. Supp. 212 (S.D.N.Y. 1969), *aff'd*, 432 F. 2nd, 429 (2nd Cir. 1970), cert. denied, 39 U.S.L.W. 3361 (U.S. Feb. 22, 1971), and in *Perdido* v. *Immigration and Naturalization Service*, 420 F.2d 1179 (5th Cir. 1969) are contrary to the purpose and intent of 8 U.S.C. 1151(b) and inapposite to the instant case?

Statutes

8 U.S.C. 1151(b)

Sec. 201(a) exclusive of special immigrants defined in Section 1019 (a) (27), and of the immediate relatives of

United States citizens specified in subsection (b) of this Section, the number of aliens who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence, or who may, pursuant to Section 203 (a) (7) enter conditionally, (i) shall not in any of the first three quarters of any fiscal year exceed a total of 45,000 and (ii) shall not in any fiscal year exceed a total of 170,000.

(b) The "immediate relatives" referred to in subsection (a) of this Section shall mean the children, spouses and parents of a citizen of the United States: Provided, That in the case of parents, such citizen must be at least twenty-one years of age. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants shall be admitted as such without regard to the numerical limitations in this Act.

AMENDMENTS TO U. S. CONSTITUTION

In pertinent part:

AMENDMENT [V]

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

AMENDMENT [XIV]

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States * * *"

Statement of Case

The petitioners, Camellia Ghassemi and Cyrus Ghassemi, are native born citizens of the United States. The petitioner, Camellia Ghassemi, was born in New York City on May 11, 1967 and the petitioner, Cyrus Ghassemi, was born in New York City on August 5, 1970. The petitioners

are the natural children of Firooz Ghassemi and Mehrbanou Ghassemi, both natives and citizens of Iran.

Firooz Ghassemi, the natural father of the infant petitioners, was admitted to the United States as a non-immigrant temporary visitor for pleasure (B-2 visa) on May 20, 1966 until July 1, 1966. He subsequently received extensions of his temporary stay until September 1, 1967. On April 5, 1968, he was granted a change of status, effective to September 5, 1968, from a non-immigrant visitor for pleasure to that of a non-immigrant visitor for business. On September 26, 1969, his application for an extension of his temporary stay was denied and he was granted until October 25, 1969 to voluntarily depart from the United States.

On November 20, 1969, Firooz Ghassemi moved for reconsideration of his application to extend his temporary stay and such motion was denied on January 13, 1970. On February 9, 1970, he submitted an application to adjust his status to that of a lawful permanent resident alien. His application was denied on March 17, 1970, on the ground that an immigrant visa was not immediately available to him, and he was granted until April 16, 1970 to effect his voluntary departure from the United States. He failed to depart on that date.

On September 1, 1970, Firooz Ghassemi was served with an order to show cause why he should not be deported and was ordered to appear for a deportation hearing before a Special Inquiry Officer of the Immigration and Naturalization Service. On October 9, 1970, the Special Inquiry Officer ordered that Firooz Ghassemi be granted voluntary departure from the United States on or before January 9, 1971, and further ordered that if he failed to depart by the required date, he would be deported to Iran. The deportation order was based on the admission of Firooz Ghassemi that he had remained in the United States after April 16, 1970 without authority. On January 6, 1971,

Firooz Ghassemi, by his attorney, requested the Immigration and Naturalization Service to extend his time to remain in the United States, but the Service failed to act on said request for extension of time. Firooz Ghassemi failed to depart from the United States by January 9, 1971, and consequently on March 3, 1971, a warrant of deportation was issued and Firooz Ghassemi was notified to present himself for deportation to Iran on March 30, 1971.

Mehrbanou Ghassemi, the natural mother of the infant petitioners, was admitted to the United States as a temporary visitor for pleasure on July 24, 1966 until December 24, 1966. She subsequently received three extensions of her stay until October 25, 1969. On October 9, 1970, an order of deportation was entered against Mrs. Ghassemi and she was given until January 9, 1971 to effect her voluntary departure from the United States. On January 7, 1971, Mehrbanou Ghassemi, by her attorney, requested the Immigation and Naturalization Service to extend her time to remain in the United States, but the Service failed to act on said request for extension of time. Mehrbanou Ghassemi failed to depart from the United States by that date, and a warrant of deportation was issued on March 3, 1971, and she was notified to present herself for deportation to Iran on March 30, 1971.

On March 26, 1971, the petitioners obtained an order directing the respondents to show cause why the deportation of Firooz Ghassemi and Mehrbanou Ghassemi should not be stayed pending final determination of the instant action. On March 29, 1971 a hearing was held on the order to show cause and the Court granted a stay of the scheduled deportation until a final decision is rendered in this action.

Reasons for Granting the Writ

In *Mandel, supra,* a three judge District Court bench recognized that the constitutional rights of citizens were

superior to the immigration laws and held certain sections of the immigration laws to be unconstitutional. 325 F.Supp. 620 (1971).

Probable jurisdiction in that case was noted on January 10, 1972 by this Court. (71-16)

That case involves the First Amendment rights of citizens to invite and hear an alien speaker who is "an exponent" of the doctrine of Karl Marx. It concerns itself with the rights of citizens, rather than with any privilege of the alien. It would appear from such decision that while an alien's right to enter and make speeches per se is subject to the Immigration Laws, nevertheless citizens' rights to have the alien enter and hear him explain and defend his views in the excercise of their constitutional rights, will prevail over the immigration laws which must yield thereto.

The same situation prevails in the instant case.

The petitioners are citizens; their parents are aliens. The deportation of the alien parents will result in the indirect deportation of the citizen petitioners, who are of too tender an age to be deprived of their parents. Accordingly, 8 U.S.C. 1151(b) is unconstitutional insofar as the rights of native born United States minor citizens are concerned.

The issue before the Court concerns the rights of native born children who are being discriminated against and deprived of their constitutional rights by virtue of legislation which prohibits them from executing a petition for a visa in behalf of their parents solely because they have not yet attained the age of twenty-one (21) years.

The issue before the Court does not involve the right of an alien seeking entry into the United States, hence the "plenary and unfettered powers" that Congress has over aliens is inapplicable and misapplied to the rights of native born citizens.

We are concerned with the rights of native born citizens, which are above and beyond the scope and authority of the "plenary and unfettered powers" of Congress over aliens.

The petitioners herein are not the "alien parents" but rather the minor native born citizen children.

A native born child cannot be deported. A native born child has the right to live in the United States; to be educated in the United States; to be raised in the United States; to the benefits of the culture; not to be discriminated against, nor to be exiled; to receive welfare if in distress.

To permit the lower Court decision to stand enables the judiciary to indirectly but effectively abort the intent of the Legislature that a native born child cannot be deported and that families of such native born children be united.

The deportation of the parents in the instant case directly affects and requires the deportation of the native born minor citizens, and further, exiles the native born minor citizens for many years.

The express purpose of the 1965 amendment is to unite families, especially those who have close family relationship to U.S. citizens. "Reunification of families is to be the foremost consideration . . . the closer the family relationship the higher the preference." Public Law 89-236. Senate Report (Judiciary Committee) No. 743 (Amend. 1965).

To permit the deportation of the alien parents of the citizen petitioners, merely because they are minors, results in not only unlawfully, inhumanly and cruelly deporting innocent and guiltless native born children, but also in exiling the same children until they are 21 years of age, contrary to the spirit of the Act.

Congress did not intend to penalize an innocent and guiltless native born child *for a period of 21 years by*

either depriving the child of the benefits of his parents or the benefits of his country.

Faustino and *Perdido, supra,* held that Congress has "plenary and unfettered powers" regarding terms and conditions upon which immigrants may enter and remain in the United States. Such holding was an erroneous misapplication and extension of such rule to minor native born citizens, over whom such Congressional control does not exist.

Both the *Faustino* and *Perdido, supra* decisions discuss at great length the rights of the "alien parents" seeking admission to the United States as permanent residents on the grounds that they have a native born minor child.

However, the decisions in *Faustino, supra,* and *Perdido, supra,* without question deny the rights of an American born child.

The decision below is contrary to the intent and purpose of the act and defeats the express intention of Congress to unite families of native born citizens, whereas issuance of the immigrant visa would be in harmony with the intent and objective of the Statute in keeping the family together and enabling the petitioner to be exposed to the advantages of an American childhood.

The distinction between minor and adult native born United States children is invidiously discriminatory against minor children.

Such classification does not have any reasonable relation to legitimate objective.

Furthermore such classification is utterly lacking in rational justification.

Equal protection requires that such distinction have some relevance to the purpose for which the classification is made. *Baxtrom* v. *Harold,* 383 U.S. 107 (1966). It guaran-

tees like treatment to all similarly situated permitting classification which is reasonable and not arbitrary.

Equal protection of law is infringed upon if such division of citizens into classes does not have a reasonable relation to the object being sought after.

In this situation, there is no reasonable basis for such classification when such distinction violates equal protection of law and denies due process. *Bolling* v. *Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L. ed. 884 (1954); *Washington* v. *U.S.* 401 F.2d 915 (1960); *People* v. *Joy,* 271 N.Y.S. 2d 15 (1966); *Flemming* v. *Nestor,* 363 U.S. 603 (1960).

Equal protection of the law means the protection of life, liberty and property by the enactment of equal laws. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). It prohibits all invidious discrimination and *requires equal protection to all in interposing no impediment to some of the people and not to others.* It requires equal protection to all in imposing no greater burdens on some and not to others.

The Statute as amended is unconstitutional in that it separates United States citizens in privileged classes over 21 years of age and a non-privileged class under 21 years of age.

There is denial of individual rights in the case at bar because of arbitrary classification into adult and minor citizens. The application of such classiffication is a denial of equal protection and violative because of the resulting invidious discriminatory consequence.

The Act deprives a minor child born in the United States of equal protection of the law, and is a denial of due process under the Fifth Amendment as well as a denial of liberty and the pursuit of happiness.

Conclusion

The issues above discussed are, it is submitted, of sufficient substantiality to require a review by the United States Supreme Court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRWIN KLEIN,
Counsel for Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of April, one thousand nine hundred and seventy-two.

Present: Hon. Henry J. Friendly,
Chief Judge,
Hon. J. Joseph Smith,
Hon. James L. Oakes,
Circuit Judges.

Camellia Ghassemi, an infant, and Cyrus Ghassemi, an infant, by Firooz Ghassemi and Mehrbanou Ghassemi, their parents and Natural Guardians,

Plaintiffs-Appellants,

v.

United States, John Mitchell, U.S. Attorney Gen., Raymond F. Farrell, Commissioner of Immigration & Naturalization and Sol Marks, Acting District Director of N.Y.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

Appendix A.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

It is further ordered, adjudged and decreed that a stay of deportation and a stay of issuance of the mandate be and it hereby is granted in accordance with the provisions of Rule 41(b) Federal Rules of Appellate Procedure.

A. Daniel Fusaro,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1469

CAMELLIA GHASSEMI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners are infant citizens of the United States. They were born in this country[1] while their parents, Iranian citizens, were here as nonimmigrants. On March 26, 1971, petitioners brought an action in the United States District Court for the Eastern District of New York in which they sought

[1] Petitioner Camellia Ghassemi was born in New York City on May 11, 1967; petitioner Cyrus Ghassemi was born in New York City on August 5, 1970.

a judgment declaring unconstitutional Section 201(b) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1151(b)),[2] and an order directing the Immigration and Naturalization Service to accept their application to have their parents classified as "immediate relatives" of United States citizens within the meaning of that section. Classification as "immediate relatives" would allow the parents to be admitted as immigrants without regard to the numerical limitations on admission of aliens established by Section 201(a) (8 U.S.C. 1151(a)). On March 29, 1971, the district court stayed the parents' deportation—which had been scheduled for the following day—pending disposition of petitioners' action. On June 16, 1971, the court, on the basis of a written opinion

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[2] Section 201, 8 U.S.C. 1151, provides in pertinent part:

(a) Exclusive of special immigrants defined in section 1101(a)(27) of this title, and of the immediate relatives of United States citizens specified in subsection (b) of this section, the number of aliens who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence * * * (i) shall not in any of the first three quarters of any fiscal year exceed a total of 45,000 and (ii) shall not in any fiscal year exceed a total of 170,000.

(b) The "immediate relatives" referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States: *Provided*, That in the case of parents, such citizen must be at least twenty-one years of age. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants shall be admitted as such, without regard to the numerical limitations in this chapter.

dated May 25, 1971,[3] granted the government's motion for summary judgment and dismissed the action. On April 10, 1972, the court of appeals affirmed without opinion, but granted a stay of mandate under Rule 41(b), Fed. R. App. P.

Petitioners contend that, because it confers "immediate relative" status upon alien parents of adult —but not minor—United States citizens, Section 201(b) violates their right to equal protection and due process under the Fifth Amendment. As noted by the district court (Opinion, p. 4 n. 1) and as recognized by the petitioners (Pet. 8), this argument was rejected in *Faustino* v. *Immigration and Naturalization Service*, 432 F. 2d 429 (C.A. 2), certiorari denied, 401 U.S. 921, affirming 302 F. Supp. 212 (S.D. N.Y.), and *Perdido* v. *Immigration and Naturalization Service*, 420 F. 2d 1179 (C.A. 5). The decisions in these cases are correct.

Even if it be assumed that a rational justification is needed for a statutory classification respecting the admission of aliens, it is plain that the Section 201(b) distinction between minors and adults is reasonably designed to meet a legitimate and narrow objective. Section 201(b) reflects a Congressional intent to facilitate the reunification of families in circumstances where, for example, a citizen who has determined to make this country his permanent home wishes to have his aging parents join him here. The Congress recognized, however, that this purpose would not be served where, as here, alien parents seek special treatment

[3] A copy of the opinion is being lodged with the Clerk.

because of the fortuitous birth of their child during a temporary stay in this country as nonimmigrants. *Perdido*, *supra*, 420 F. 2d at 1181; accord, *Faustino*, *supra*, 432 F. 2d at 430.[4] The statute was drafted to serve this limited objective: it avoids the unintended conferral of special status upon the alien parents of an infant born in this country, and it seeks to insure that the citizen child is old enough to make a responsible decision as to his permanent home.

Kleindienst v. *Mandel*, No. 71-16 (argued April 18, 1972), to which petitioners refer, involves the unrelated question whether the exclusion of certain aliens under the Immigration and Nationality Act of 1952 is constitutionally impermissible on the ground that it deprives American citizens, who wish to hear such an alien in person, of freedom of speech under the First Amendment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE, 1972.

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[4] For a brief discussion of the pertinent legislative history, see the district court's opinion in *Faustino*, 302 F. Supp. at 215-216.

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